



January 24, 2002

Ms. Carol E. Matthey  
Federal Communications Commission  
Common Carrier Bureau  
445 12th St., SW  
Washington, DC 20554

RE: CC Docket No. 98-184 Bell Atlantic/GTE Merger  
CC Docket No. 98-141 SBC/Ameritech Merger

Dear Ms. Matthey,

By this letter, Focal Communications Corporation of Washington ("Focal") responds to Verizon's December 17, 2001 ex parte submission in the above-referenced dockets.<sup>1</sup> Focal respectfully urges the Bureau and Commission to reject the most recent in a series of attempts by Verizon to renege on an important provision of Verizon's voluntarily-negotiated Merger Conditions.<sup>2</sup>

Pursuant to Paragraph 32 of the Merger Conditions, which was essentially a cross-border MFN provision, CLECs were permitted to adopt negotiated interconnection agreements between states in the Verizon footprint. In its most recent ex parte, Verizon asks for "clarification" that Paragraph 32 of the Merger Conditions never extended to portions of such agreements governing compensation for ISP-bound traffic, notwithstanding the plain language of the Merger Conditions allowing the adoption of an entire agreement. More accurately, Verizon asks the Bureau to reverse a position stated approximately one year earlier that the Merger Conditions allow CLECs to adopt entire agreements, including those provisions concerning compensation for ISP traffic.<sup>3</sup>

In response to Verizon's requests, on March 30, 2001, the Bureau sought comments as to whether there are grounds to waive or modify the relevant MFN conditions.<sup>4</sup> Section 1.3

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<sup>1</sup> Letter from Gordon Evans to Carol Matthey (December 17, 2001).

<sup>2</sup> GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D, p. 1 (rel. June 16, 2000) ("Bell Atlantic/GTE Merger Order"). (The Bell Atlantic/GTE Merger Conditions are contained in Appendix D (the "Merger Conditions").)

<sup>3</sup> Letter from Carol Matthey to Michael Shor, CC Docket No. 98-184, DA 00-2890, December 22, 2000 ("December 22, 2000 CCB Letter" or "CCB Letter").

<sup>4</sup> Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders, Public Notice, CC Docket Nos. 98-141, 98-184, DA 01-722 (rel. Mar. 30, 2001).

of the Commission's rules, 47 C.F.R. § 1.3 states that the Commission may waive any provision of its rules "if good cause therefor is shown." For a waiver to be granted, the applicant must demonstrate that the general rule is not in the public interest when applied to a particular case and that the waiver will not undermine the public policy served by the rule.<sup>5</sup> In this instance, Verizon has failed to demonstrate any good cause for changing the MFN rule as stated in the December 22, 2000 CCB letter. Indeed, removing intercarrier compensation provisions for ISP traffic from this requirement would undermine the public policy of the rule, which was to facilitate the ability of CLECs to adopt interconnection agreements across state lines. If provisions relating to compensation for ISP traffic are removed retroactively, as Verizon wishes, CLECs would be unable to adopt "entire interconnection agreements" as the language and purpose of Paragraph 32 of the Merger Conditions so plainly require.

Focal's stake in this issue arises from Verizon's continued refusal to honor a request dating back to October 4, 2000 to adopt a GTE-Time Warner agreement from North Carolina into the state of Washington in Docket No. UT-013019. On October 17, 2001, an Administrative Law Judge recommended that Verizon should be required to issue the agreement Focal requested, relying at least in part on the December 22, 2000 CCB letter. Verizon has since filed a Petition for Review, which is currently pending.<sup>6</sup> In addition to the substantive arguments discussed below, Verizon's Petition argues that the December 22, 2000 CCB letter represents merely an informal opinion of staff and is not binding authority.<sup>7</sup> Focal's Answer to Verizon's Petition is attached for your review.

Instead of explaining why good cause exists to waive or modify the relevant MFN conditions as the Bureau requested, Verizon continues to argue that the Paragraph 32 MFN provision only applies to obligations set forth in 251(c) and not to full interconnection agreements. Verizon had previously argued that portions of interconnection agreements concerning the 251(b) reciprocal compensation obligation are not covered, an argument explicitly rejected by the December 22, 2000 CCB Letter. Verizon now argues that the prior CCB Letter was premised on 251(b) being incorporated by reference in 251(c), and since the Commission's ISP Remand Order<sup>8</sup> now categorizes ISP traffic as an exception to the telecommunications traffic subject to reciprocal compensation under pursuant 251(b), this traffic is now outside the scope of Paragraph 32.

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<sup>5</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)

<sup>6</sup> The WA ALJ Decision, which characterized Verizon's conduct in this matter as "egregious," is currently stayed, pending the Petition filed by Verizon.

<sup>7</sup> Focal disputed this argument, noting that the December 22, 2000 CCB letter was issued pursuant to Delegated Authority and that such staff actions, "except for the possibility of review . . . have the same force and effect as actions taken by the Commission." 47 C.F.R. § 0.5.

<sup>8</sup> In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Inter-carrier Compensation for ISP-Bound Traffic, CC docket 96-98, 99-68, Order on Remand and Report and Order, (FCC 01-131, Released April 27, 2001) ("ISP Remand Order").

Verizon's recent ex parte has completely misunderstood the earlier CCB Letter. As noted in the December 22, 2000 CCB Letter

the *Merger Conditions* expressly state that the rules and requirements of section 252(i) apply to all requests for interconnection arrangements and UNEs under the MFN provisions of the *Merger Conditions*. The MFN provisions expand the section 252(i) opt-in rights of CLECs by allowing CLECs to import interconnection arrangements (including entire agreements) from one state into another state, thereby reducing the time and expense of negotiating interconnection agreements.

Verizon's claim that the ISP Remand Order now vindicates its tortured logic concerning the interplay of 251(c) and Paragraph 32 completely misses the most basic conclusion from the December 22, 2000 CCB letter, which is that Paragraph 32 expands CLECs' 252(i) rights in allowing them to adopt entire interconnection agreements across state borders.

Moreover, Verizon's claim that the ISP Remand Order somehow changes this analysis for agreements imported prior to the release of the Order is unsound. The ISP Remand Order did not retroactively limit opt-in rights for those portions of interconnection agreements addressing compensation for ISP traffic. Indeed, the ISP Remand Order was quite explicit in stating that it was not intending to disturb existing interconnection agreements, but was prospectively limiting opt-in rights insofar as the opt-in request covered compensation for ISP traffic.

The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic.<sup>9</sup>

The words "no longer" are underlined in the passage quoted above to emphasize the Commission's view that the 252(i) opt-in right previously extended to provisions of agreements addressing compensation for ISP traffic. Indeed, it is clear that the Commission upheld the enforceability of intercarrier compensation provisions for ISP traffic under existing contracts, whether such contracts were negotiated, arbitrated or adopted via 252(i).

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<sup>9</sup> ISP Remand Order at para. 82 (emphasis added).

Focal's request from October 4, 2000 to adopt the GTE-Time Warner Agreement from North Carolina to Washington constitutes one of the previous arrangements that the FCC preserved in its ISP Remand Order. At the time the request was made, well before the ISP Remand Order was adopted, the law was clear that CLECs were permitted to exercise their 252(i) rights to adopt entire agreements, including provisions addressing compensation for ISP traffic. Moreover, the December 22, 2000 CCB letter confirmed that the Merger Conditions expanded those rights to include agreements from other states, including the compensation provisions for ISP traffic. Although the ISP Remand Order changed the character of ISP traffic prospectively, it did nothing to change the provisions of agreements or the 252(i) rights of CLECs as to agreements entered into prior to the ISP Remand Order. Accordingly, CLECs such as Focal that exercised their opt-in rights under the Merger Conditions prior to the ISP Remand Order are entitled to inclusion of provisions for compensation of ISP traffic.

Because Verizon has failed to show good cause as to why the MFN provision should be waived or modified with regard to ISP traffic compensation provisions, Verizon's request for clarification should be rejected.

Sincerely,

/s/

Pamela S. Arluk

Senior Counsel

Focal Communications Corporation of Washington

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cc: Anthony Dale (via e-mail)

Mark Stone (via e-mail)

Office of the Secretary (via electronic filing)

## **ATTACHMENT**

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

FOCAL COMMUNICATIONS	)	
CORPORATION OF WASHINGTON,	)	
	)	
Petitioner,	)	
	)	DOCKET NO. UT-013019
v.	)	
	)	
VERIZON NORTHWEST, INC.,	)	
	)	
Respondent.	)	
.....	)	

**ANSWER OF  
FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON  
IN RESPONSE TO VERIZON’S PETITION FOR REHEARING**

Focal Communications Corporation of Washington (“Focal”), by its undersigned attorneys, hereby submits its Answer in response to the Petition for Administrative Review, dated November 5, 2001, filed November 6, 2001, by Verizon Northwest, Inc. (“Verizon”).

It has been more than a year since Focal first requested to adopt an interconnection agreement between Verizon and Time Warner, pursuant to the voluntarily-negotiated FCC Merger Commitments, agreed to by Verizon in consideration for the approval of the merger between GTE and Bell Atlantic.<sup>10</sup>

The Initial Order in this matter correctly characterized Verizon’s continued refusal to honor its voluntarily-negotiated Merger Commitments as “egregious conduct,”<sup>11</sup> and this

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<sup>10</sup> *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D, p. 1 (rel. June 16, 2000) (“Bell Atlantic/GTE Merger Order”). (The Bell Atlantic/GTE Merger Conditions are contained in Appendix D (the “Merger Conditions or Merger Commitments”).)

<sup>11</sup> See Initial Order at ¶ 51.

conduct has not abated a single degree. Verizon's Petition for Review has no basis in law or fact and should be denied. Verizon should be directed to immediately honor Focal's request to adopt the full and complete interconnection agreement between Verizon and Time Warner, as required in the voluntarily-negotiated Merger Commitments, consistent with this Commission's Interpretive and Policy Statement, and as directed in the Initial Order.

## **BACKGROUND**

Focal is a national facilities-based CLEC and has provided service in Washington since 1999. In order to operate in Verizon (formerly GTE) territory, Focal initially adopted the interconnection agreement between Verizon and AT&T, pursuant to 47 U.S.C. §252(i).<sup>12</sup> After operating under this adoption of the AT&T agreement for over a year, Verizon notified Focal that the contract would be terminated upon its expiration date, September 24, 2000. Following some unproductive negotiations with Verizon for a successor to the AT&T agreement, Focal requested to adopt a negotiated agreement between Verizon and Time Warner from North Carolina, by a letter dated October 24, 2000.<sup>13</sup> Focal's request to adopt the Time Warner agreement was issued pursuant to voluntarily-negotiated Merger Conditions, bargained for and agreed to by Verizon in order to secure regulatory approval of the marriage between the former GTE and Bell Atlantic companies. Among the conditions accepted by Verizon was an obligation to permit CLECs to "import" all or part of a pre-merger negotiated GTE contract from one GTE state into any other part of GTE's territory (subject to various conditions and limitations), essentially a cross-border Most Favored Nation (MFN) provision. Specifically, Paragraph 32 of the Merger Commitments provides, in relevant part, as follows:

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<sup>12</sup> Focal's adoption of the GTE-AT&T agreement was approved July 28, 1999 in Docket UT-990365.

... Bell Atlantic/GTE shall make available in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including the entire agreement) subject to 47 USC. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date... Exclusive of price and state-specific performance measures and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)... Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.<sup>14</sup>

Focal invoked Paragraph 32 to import an agreement into Washington that was negotiated between GTE and Time Warner in North Carolina. Notwithstanding its acceptance of the Merger Conditions, Verizon has steadfastly refused to honor Focal's request to adopt the GTE-Time Warner agreement.

## SUMMARY

As its main claim, Verizon argues, incorrectly, that Paragraph 32 of the Merger Conditions does not obligate it to offer those portions of interconnection agreements related to reciprocal compensation. Indeed, Verizon's strained interpretation of Paragraph 32 has been specifically rejected by the FCC's Common Carrier Bureau (CCB) in an opinion letter issued December 22, 2000.<sup>15</sup> The FCC has emphasized that the Merger Conditions require Verizon to make an entire negotiated agreement available for import from one GTE state to another. Verizon incorrectly dismisses the CCB letter as mere "informal" musings of the Deputy Chief of the Common Carrier Bureau and suggests that the CCB letter is not binding. In fact, and as

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<sup>13</sup> A copy of Focal's October 4, 2000 letter is attached as Ex. B to Focal's Petition for Enforcement (March 21, 2001).

<sup>14</sup> The full text of this lengthy Paragraph 32 is attached as Ex. A to Focal's initial Petition for Enforcement (March 21, 2001), and was also attached as Ex. A to Verizon's Petition for Review (Nov. 5, 2001).

<sup>15</sup> December 22, 2000 CCB Opinion Letter, attached as Exhibit A.

should be well known to Verizon's District of Columbia-based counsel, pursuant to explicit FCC regulations, such letters, issued under delegated authority, carry the full force and weight of the FCC, unless and until stayed or modified by the full Commission.

Verizon also claims that the FCC's recent order on compensation for Internet-bound traffic bars Focal from its requested relief.<sup>16</sup> Again, Verizon is misstating federal law. The FCC Order cited by Verizon explicitly refuses to disturb previous state decisions or existing agreements addressing compensation for Internet-bound traffic, although the FCC did assert jurisdiction over this traffic on a prospective basis. Focal has been entitled to the GTE-Time Warner agreement since it was requested back on October 4, 2000, and the FCC's order, released April 27, 2001 did not disturb Focal's previous right to invoke Paragraph 32 of the Merger Conditions. It is only through Verizon's continued unreasonable conduct that the issue is still unresolved more than a year later.

## **ARGUMENT**

### **1. As confirmed by the FCC, the Merger Conditions allow Focal to opt-in to an entire negotiated agreement from another GTE state, not just limited portions.**

Verizon's obligations under the Bell Atlantic/GTE Merger Order and Merger Conditions are crystal clear: a requesting telecommunications carrier is entitled to adopt any interconnection arrangement, including an entire agreement, to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), so long as it was voluntarily negotiated – pre-merger – anywhere in GTE's legacy service area. Verizon attempts to insert ambiguity in the Merger Conditions where there is none, arguing that Verizon is only obligated to make available

to Focal those provisions of an interconnection agreement that are delineated in § 251(c) of the Federal Telecommunications Act (FTA), and not provisions under § 251(b). A plain reading of the Merger Conditions and the Bell Atlantic/GTE Merger Order should leave no doubt that all interconnection arrangements, including those set forth in section 251(b) and entire interconnection agreements, can be adopted across state borders "...to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)."<sup>17</sup> Verizon's position flies in the face of the express language of paragraph 32 of the Merger Conditions in the Bell Atlantic/GTE Merger Order, which specifically allows carriers to adopt an "entire agreement." Verizon's tortured logic, that portions of an agreement addressing 251(b)(5) do not qualify, has been soundly rejected by the FCC, which clarified that it meant what it said when it said that an "entire agreement" can be imported across state borders under the same terms and conditions that apply to a 47 U.S.C. 251(i):

...The plain language of the *Merger Conditions* permit a CLEC to obtain an entire interconnection agreement under the MFN provisions, so long as the agreement was voluntarily negotiated and meets the timing and location requirements specified in the conditions. Focal thus correctly points out that, in the *Bell Atlantic/GTE Merger Order*, the Commission articulated its understanding of the term "interconnection arrangement" to encompass "entire interconnection agreements or selected provisions from them."

Verizon is incorrect in asserting that the reference to section 251(c) limits a CLEC's opt-in rights under the MFN provisions of the *Merger Conditions*.... Specifically, Verizon asserts that subjects addressed by section 251(b), e.g., reciprocal compensation, number portability, and access to rights-of-way, fall outside the scope of the *Merger Conditions* because of the express reference to section 251(c) in the MFN provisions. Section 251(b) is incorporated explicitly into section 251(c) at the outset of that subsection, however, and further in the subsection establishing a duty for the incumbent LECs to negotiate agreements in good faith.<sup>18</sup>

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<sup>16</sup> In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Inter-carrier Compensation for ISP-Bound Traffic, CC docket 96-98, 99-68, Order on Remand and Report and Order, (FCC 01-131, Released April 27, 2001) ("ISP Remand Order"). This Order is now on appeal to the DC Circuit.

<sup>17</sup> Merger Conditions at ¶ 32.

<sup>18</sup> December 22, 2000 Opinion Letter at pp. 2-3 (footnotes omitted).

The Opinion Letter clearly explained that the MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state.

**2. The FCC Opinion Letter confirming that the Merger Conditions require Verizon to allow CLECs to import an entire agreement is valid and binding.**

The Opinion Letter issued by the FCC’s Common Carrier Bureau – explaining that carriers are entitled to import entire agreements across state borders – is binding in this case. Verizon’s suggestion that the Opinion Letter is informal, or that the matter is still unsettled because Verizon has sought further review and/or a waiver of the merger conditions, is simply incorrect as a matter of law. The Common Carrier Bureau acted under delegated authority in issuing the Opinion Letter, giving the Opinion Letter the force of law, pursuant to FCC Regulations.<sup>19</sup>

Verizon’s citation to sections 553(b)-(d) of the federal Administrative Procedure Act (APA) is misplaced.<sup>20</sup> Section 553 of the APA applies to “rulemaking,” a term of art which has a specific meaning under §551 of the APA and the interpretive case law.<sup>21</sup> Here, the CCB was merely confirming to Verizon that the Merger Conditions mean what they say, and was not engaging in rulemaking to establish new policy or modify existing policy. Verizon may be disappointed that the Bureau rejected its novel interpretation of the Merger Conditions in the context of Focal’s opt-in request, but that does not entitle Verizon to ask a state commission to adopt an interpretation of the FCC’s own Merger Conditions – conditions Verizon voluntarily agreed to in return for approval of its merger – that the FCC itself refused to adopt.

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<sup>19</sup> 47 C.F.R. § 0.5(c) (2000).

<sup>20</sup> See Verizon’s Petition for Review at 5, n.10.

<sup>21</sup> 5 U.S.C §§ 551, 553.

Verizon's reliance on an Interim ALJ decision from New Jersey, is also puzzling.<sup>22</sup> That Interim Decision, which Verizon acknowledges is not binding on this Commission, does not even appear to address the same issue. The New Jersey Interim Decision appears to address *arbitrated* portions of an interconnection agreement and insurance provisions, which are not at issue in this docket. Most significantly, the New Jersey Interim Decision does not address the question, at issue here and explicitly considered by the FCC: whether a negotiated provision addressing § 251(b) is included within the meaning of agreements described in §251(c), a question that has been resolved in Focal's favor by the CCB letter. The CCB Letter was issued under delegated authority from the FCC and is therefore afforded the same weight as a full FCC order.

**3. The FCC's ISP Compensation Order – issued in April, 2001 – does not impact Focal's right to import the GTE-Time Warner agreement because Focal's request dates back to October 4, 2000 and the delay in this case has resulted solely from Verizon's refusal to honor its Merger Commitments.**

Verizon now claims that the FCC's order addressing compensation for Internet-bound traffic preemptively bars this Commission from granting Focal's requested relief.<sup>23</sup> However, the FCC order cited by Verizon actually emphasized that it was establishing a prospective regime only and explicitly refused to disturb existing contracts or state decisions:

82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.<sup>24</sup>

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<sup>22</sup> See Verizon's Petition for Review at 12-13 & Ex. G.

<sup>23</sup> See Verizon's Petition for Review at 2, n.3, and 11, citing, "In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic," CC docket 96-98, 99-68, Order on Remand and Report and Order, (FCC 01-131, Released April 27, 2001) ("ISP Remand Order"). This Order is now on appeal to the DC Circuit.

<sup>24</sup> ISP Remand Order at ¶ 82.

In a similar context, the Public Utilities Commission of California recently sought an interpretation from the FCC on the very issue of when a carrier's opt-in rights expired under the FCC's ISP Remand Order. In the California proceeding, Focal sent a letter to Pacific Bell on April 17, 2001 advising it that Focal was exercising its 252(i) rights with respect to a certain interconnection agreement. The California Commission's legal staff determined, in consultation with the FCC, that competitive local exchange carriers were eligible to invoke Section 252(i) of the Act, as it applies to rates paid for exchange of reciprocal compensation, up and until May 15, 2001.<sup>25</sup>

In this case, Focal invoked its right to opt-in to the Time Warner Agreement on October 4, 2000, long before the FCC Order was adopted. Focal's opt in right was fixed and intact when Focal exercised it last year, Verizon's delay tactics notwithstanding. Indeed, it is only Verizon's arbitrary and unreasonable conduct that has kept this issue outstanding so long.

Focal acknowledges that this FCC Order currently preempts state commissions from addressing the *substantive* issue of compensation for Internet traffic, at least on a prospective basis. However, in this case, Focal is not asking for this Commission to address the substantive issue of compensation. Instead, Focal is seeking enforcement of its opt-in right, which it exercised back in October, 2000.

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<sup>25</sup> A copy of the letter ruling issued by the Director of the Telecommunications Division of the Public Utilities Commission of the State of California is attached as Exhibit B. Although not binding on this Commission, the California decision is informative because the California staff consulted with the FCC.

**4. The Finding in the Interim Decision that Focal's right to the Time Warner agreement should date back to December 22, 2000 is appropriate; Verizon should not be permitted to benefit from its egregious behavior in refusing to honor its Merger Commitments.**

Verizon urges the Commission to make Focal's adoption of the Time Warner agreement effective, if at all, only on a prospective basis.<sup>26</sup> Although it does not disclose its motivation in its pleading, the Commission should understand that Verizon's reason for seeking this modification of the Initial Order is an attempt to further benefit from its own delay in issuing this agreement. Verizon believes, erroneously, that it may gain some advantage from making Focal's adoption of the Time Warner agreement effective some time after the first fiscal quarter of 2001.

The significance of the first fiscal quarter of 2001 flows from the FCC's ISP Remand Order, which caps a CLEC's entitlement to compensation for Internet-bound traffic to the number of minutes for which the CLEC was entitled to compensation during the first quarter.<sup>27</sup> If Verizon can game this proceeding to leave Focal without any interconnection agreement during that quarter, it apparently believes that it may be able to cap Focal's compensation for Internet-bound traffic at zero.<sup>28</sup> For the same reason, Verizon also inserts gratuitous, and incorrect statements in its brief that Focal and Verizon had agreed to exchange traffic on a bill and keep basis.<sup>29</sup> Although not really relevant to the issue now before this Commission, Verizon's suggestions that Focal agreed to bill and keep, either in the prior AT&T opt-in agreement or the requested Time Warner agreement are absolutely false.

Although Focal emphatically disagrees with Verizon's claim that no compensation was owed for Internet-bound traffic during the first fiscal quarter of 2001, the question is not

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<sup>26</sup> Verizon Petition for Review at p. 13-14.

<sup>27</sup> FCC ISP Remand Order at ¶ 78.

<sup>28</sup> Verizon's view on this subject is explained in a letter from its counsel, Nigel Atwell, dated October 10, 2001. This letter and the entire chain of correspondence on this matter are also attached as Exhibits C-E.

